IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

MICHAEL DOBKIN, individually and on behalf of all others similarly situated, *Plaintiff,* *v.* NRG RESIDENTIAL SOLAR SOLUTIONS LLC, a Delaware limited liability company, *Defendant*.	**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AN ORDER TO SHOW CAUSE** Case No.: 1:17-mc-00005 .
ERICA GENNARINI, individually and on behalf of all others similarly situated, *Plaintiff,* *v.* NRG RESIDENTIAL SOLAR SOLUTIONS LLC, a Delaware limited liability company, *Defendant*.	[Underlying Action currently pending—Case No. 3:15-cv-05089-BRM-LHG; Hon. Judge Brian R. Martinotti]

Michael Dobkin and Erica Gennarini (collectively, "Plaintiffs in the Underlying Action" or "Plaintiffs"), by and through their attorneys and pursuant to Rule 45 of the Federal Rules of Civil Procedure, hereby respectfully move this Honorable Court for an order requiring One Touch Calls, LLC ("One Touch") to show cause for its failure to comply with subpoenas properly issued by Plaintiffs in the Underlying Action which were served within this judicial district.

Specifically, Plaintiffs in the Underlying Action seek an Order (i) requiring One Touch to show cause as to why it should not be held in contempt of Court, (ii) imposing appropriate sanctions should it fail to do so, and (iii) granting any additional relief the Court deems reasonable and just. In support of this Motion, Plaintiffs in the Underlying Action state as follows:

INTRODUCTION

This Motion is the culmination of a six month-long effort to obtain documents and information from One Touch that Plaintiffs Dobkin and Gennarini contend are relevant to their underlying cases captioned *Dobkin v. NRG Residential Solar Solutions LLC* and *Gennarini v. NRG Residential Solar Solutions, LLC*, No. 3:15-cv-05089 (D.N.J) (the "Underlying Action"), which have been consolidated into a single case that is currently pending in the United States District Court for the District of New Jersey before the Honorable Brian R. Martinotti. In the Underlying Action, Plaintiffs Dobkin and Gennarini allege that NRG Residential Solar Solutions, LLC ("NRG" or "Defendant in the Underlying Action") violated the Telephone Consumer Protection Act, 47 U.S.C. §§ 227 ("TCPA"). *See Dobkin*, Second Amended Class Action Complaint (the "Complaint"), Dkt. 28, and *Gennarini v. NRG Residential Solar Solutions, LLC*, 3:16-cv-00628 (D.N.J.), Dkt. 1-2, copies of which are attached hereto as Composite Exhibit 1.[1] One Touch is a call center hired by NRG to contact potential customers and is believed to be responsible for running one of the automated telephone dialing systems that made the calls at issue in the Underlying Action.

In effort to obtain discovery in the Underlying Action, Plaintiffs served One Touch with a Subpoena to Produce Documents (the "Document Subpoena") on August 26, 2016 seeking, *inter alia*, documents regarding the number and manner of the phone calls at issue. *See* Exhibit 2, Document Subpoena to One Touch; Exhibit 3, Proof of Service for Document Subpoena to

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[1] Unless otherwise stated, all citations to the Complaint and Docket refer to the Underlying Action.

One Touch. Although One Touch made a partial production with documents showing that it indeed had relevant information in its possession – such as the number of calls placed and the contact information of certain class members that were called – in the weeks that followed, it never completed its production. Moreover, although Plaintiffs' Counsel repeatedly attempted to follow up with One Touch's Vice President, Muhammad Mahmood who was originally cooperating with Plaintiffs' Counsel, he ceased responding entirely.

Plaintiffs likewise issued and served a Subpoena to Testify at Deposition (the "Deposition Subpoena" and, in conjunction with the Document Subpoena, the "Subpoenas") to One Touch, which commanded One Touch's corporate representative to appear for a deposition on February 15, 2017. *See* Exhibit 4, Deposition Subpoena to One Touch; Exhibit 5, Proof of Service for Deposition Subpoena to One Touch. Again, although Plaintiffs' Counsel made repeated attempts to contact One Touch, Plaintiffs' Counsel did not receive any objection or response and the witness did not appear at the deposition. Therefore, at this point, and because One Touch has refused to provide information critical to the advancement of the Underlying Action, Plaintiffs have no choice but to institute this action and seek a court order directing One Touch to appear and explain why it should not be held in contempt, and if it cannot do so, holding One Touch in contempt.

RELEVANT FACTS AND PROCEDURAL HISTORY

The Complaint in the Underlying Action alleges that NRG, through its agent(s), made thousands (and perhaps millions) of unsolicited telemarketing autodialed and prerecorded robocalls to consumers nationwide—that promoted NRG's in-home solar installation services—in violation of the TCPA. *See generally*, Composite Ex. 1. Through the course of the litigation, Plaintiffs discovered that One Touch operates one of the call centers hired by NRG and subsequently issued Subpoenas to obtain information relevant to their claims. *See* Exs. 2 and 4. However, and as described in detail below, One Touch has wholly failed to satisfy its obligations.

Plaintiffs' Document Subpoena

In an effort to obtain information believed to be within the exclusive possession, custody, or control of One Touch, Plaintiffs served the Document Subpoena on One Touch's authorized agent located at 13511 Pennsboro Drive in Chantilly, Virginia on August 26, 2016. *See* Exs. 2 and 3. Specifically, the Document Subpoena commanded the production of records of certain calls that One Touch is believed to have initiated to telephone numbers within the United States on behalf of NRG. *See* Ex. 2. One Touch's objections to the Document Subpoena were due by September 9, 2016 and its document production was due on September 15, 2016. *See* Exs. 2 and 3.

Shortly after the Document Subpoena was served, Mr. Mahmood reached out to Plaintiffs' Counsel by telephone and indicated One Touch would comply with the Document Subpoena. *See* Exhibit 6, Declaration of Stewart Pollock ("Pollock Decl.") at ¶ 5. During a phone call on September 1, 2016, Mr. Mahmood further indicated that he had responsive documents and would produce those documents by the end of the following week (i.e. by September 9, 2016). *Id.*; *see also* Composite Exhibit 7, Emails Between Mr. Mahmood and Plaintiffs' Counsel (Sept. 2, 2016 Email stating that "I will get you required documents as soon as possible"). Mr. Mahmood subsequently produced (7) pages of responsive documents, which included call scripts, a document titled "TCPA Laws and Regulations" with an eight-bullet point summary of pertinent rules, and screenshots of One Touch's internal call-tracking software. *See* Composite Ex. 7 (Sept. 8, 2016 Email). Based on that production—which plainly evidenced that

One Touch has relevant information in its possession—Plaintiffs' Counsel repeated their request for documents identifying "the number of calls that you placed on behalf of NRG" and information sufficient to identify call recipients. *See Id.* (Sept. 14, 2016 Email from Plaintiffs' Counsel).

In the days that followed, Plaintiffs' Counsel continued to confer with Mr. Mahmood, during which time he indicated that, while he did not have any call logs or recordings of calls prior to 2016,[2] he did possess "recordings of current customers and screenshots as well." *Id.* (Sept. 15, 2016 Email from Mr. Mahmood). Per agreement with Plaintiffs' Counsel, One Touch produced a sampling of ten (10) such call recordings and a screenshot of its internal call-tracking software. *Id*. (Sept. 15, 2016 Emails from Mr. Mahmood attaching call recordings and screenshot of call statistics). After listening to the initial sampling of the recordings and discovering that each recording included the name and contact information of the class members called, Plaintiffs requested that all recordings be preserved and produced immediately. *Id.* (Sept. 16, 2016 Email from Plaintiffs' Counsel); *see also* Pollock Decl. at ¶ 6. Mr. Mahmood agreed to make such production by no later than September 20, 2016. *See* Composite Ex. 7 (Sept. 21, 2016 Email from Plaintiffs' Counsel regarding One Touch's missed deadline for production). On September 26, Mr. Mahmood sent two additional screenshots of One Touch's internal call-tracking software, but did not include any of the promised call recordings or other requested information. *Id.* (Sept. 26, 2016 Emails between Plaintiffs' Counsel and Mr. Mahmood).

Nevertheless, and despite Mr. Mahmood's repeated assurances that a complete production was forthcoming, One Touch and Mr. Mahmood have failed to produce any

[2] Mr. Mahmood indicated that he did not have such records because they were in the possession of an overseas call center. Composite Ex. 7 (Sept. 15, 2016 Email from Mr. Mahmood).

additional documents or otherwise respond to any of Plaintiffs' communications since September 26, 2016. *See* Ex. 6, Pollock Decl. at ¶¶ 7-8.

Plaintiffs' Deposition Subpoena

On January 19, 2017, Plaintiffs served the Deposition Subpoena on One Touch's authorized agent at their office in Chantilly, Virginia. *See* Ex. 5. The subpoena commanded a One Touch representative to sit for his or her deposition on February 15, 2017. *See* Ex. 4. Shortly thereafter, Plaintiffs' Counsel again made repeated attempts to contact Mr. Mahmood by email and phone to determine if One Touch intended to comply with the Deposition Subpoena. *See* Composite Ex. 7 (Feb. 3, 2017 and Feb. 9, 2017 Emails from Plaintiffs' Counsel). Mr. Mahmood never responded to Plaintiffs' Counsel's attempt to contact him, nor did a One Touch representative appear for its deposition. *See* Ex. 6, Pollock Decl. at ¶¶ 7-8; Exhibit 8, Non-Appearance Deposition Transcript.

Because One Touch has failed to fully comply with the Subpoenas, Plaintiffs now seek an order requiring One Touch to show cause as to why it should not be held in contempt.

ARGUMENT

I. The Court Should Enter an Order Requiring One Touch to Explain Why It Should Not be Held in Contempt for Its Failure To Respond to Plaintiffs' Subpoenas.

Rule 45 of the Federal Rules of Civil Procedures permits a party to command a non-party to produce documents and appear for a deposition by issuing and serving a subpoena. *See Hanwha Azdel, Inc. v. C & D Zodiac, Inc.*, No. 6:12-cv-00023, 2013 WL 3660562, at *5 (W.D. Va. July 11, 2013) (citing Fed. R. Civ. P. 45(a)(2)(C), (b)(2)(B)). The scope of subpoenas issued pursuant to Rule 45 of the Federal Rules of Civil Procedure is the same as the scope of discovery under Rule 26 of the Federal Rules of Civil Procedure. *See HDSherer LLC v. Nat. Molecular Testing Corp.*, 292 F.R.D. 305, 308 (D.S.C. 2013). Thus, a party seeking information is broadly permitted to discover any non-privileged matter that is relevant to any party's claim or defense from parties and non-parties alike. *Id.* And, as with discovery under Fed. R. Civ. P. 26, relevancy is not limited to information that would be admissible at trial; rather, it is broadly construed. *Id.*

Any objections to a subpoena must be served prior to the date for compliance or within either fourteen (14) days of the service of the subpoena – whichever is earlier. Fed. R. Civ. P. 45(d)(2)(B) (requiring objection to "be served before the earlier of the time specified for compliance or 14 days after the subpoena is served"). If a non-party fails to timely raise an objection to the subpoena, it waives its right to do so. *Hanwha Azdel, Inc*, 2013 WL 3660562, at *4 ("it is undeniable that an objection to improper service can be deemed waived if the responding party fails to submit a timely objection thereto"). Further, a non-party may waive its right to object if it agrees to produce responsive documents. *Id.* (holding that because the non-party had "agreed to produce documents responsive to the subpoena [it had] waived any Rule 45(b) deficiencies").

Here, the Court should enter an order requiring One Touch to show cause as to why it has not fully responded to Plaintiffs' Subpoenas. To start, the Subpoenas were properly issued by the Court where the Underlying Action is now pending and were properly served on an authorized agent of One Touch. *See* Exs. 2-5; *see also* Fed. R. Civ. P. 45(a)(2). Further, the Subpoenas sought information relevant to the claims in the Underlying Action that were reasonably tailored in scope to avoid imposing an undue burden on One Touch. *See* Fed. R. Civ. P. 45(d)(1); *Krakauer v. Dish Network L.L.C.*, 311 F.R.D. 384, 393 (M.D.N.C. 2015) (holding that third-party records, including call lists, were relevant and discoverable evidence for establishing commonality and ascertainability in certification of TCPA class). Additionally, One Touch failed to timely raise objections to either of the Subpoenas and therefore has waived its right to object.

Specifically, One Touch's objections to the Document Subpoena were due by September 9, 2016 and its objections to the Deposition Subpoena were due by February 2, 2017. *See* Fed. R. Civ. P. 45(d)(2)(B); Ex. 3 (showing the Document Subpoena was served on August 26, 2016); Ex. 5 (showing the Deposition Subpoena was served on January 19, 2017). Moreover, because One Touch agreed to respond to the Document Subpoena, but then failed to make a full production, it further "waived any Rule 45(b) deficiencies." *Hanwha Azdel, Inc*, 2013 WL 3660562, at *4. As such, the Court should enter an order requiring One Touch to show cause for its failure to comply with the Subpoenas. *See SonoMedica, Inc. v. Mohler*, No. 1:08-CV-230(GBL), Dkt. 124 (E.D. Va. August 22, 2008) (ordering non-party to show cause as to why they "should not be held in contempt and sanctioned for noncompliance with the subpoena").

II. The Court Should Hold One Touch in Contempt for its Failure to Comply with the Subpoenas.

If One Touch cannot show cause as to why it failed to comply with the Subpoenas, the Court should likewise hold One Touch in contempt. The Court may hold in contempt a non-party that cannot show an "adequate excuse" for its failure to fully comply with a subpoena. *SonoMedica, Inc. v. Mohler*, No. 1:08-CV-230(GBL), 2009 WL 2371507, at *3 (E.D. Va. July 28, 2009) (imposing sanctions against non-party for failure to comply with subpoena without "adequate excuse"); *Commonwealth Const. Co. v. Redding,* No. 1:14-CV-3568-GLR, 2015 WL 877406, at *1 (D. Md. Feb. 27, 2015) (a court may "hold in contempt a person who, having been served [a subpoena], fails without adequate excuse to obey the subpoena or an order related to it.") (quoting Fed. R. Civ. P. 45(g)).

The Fourth Circuit applies a four-part test to establish civil contempt, which requires a showing: "(1) [of] the existence of a valid decree of which the alleged contemnor had actual or constructive knowledge; (2) . . . that the decree was in the movant's 'favor'; (3) . . . that the alleged contemnor by its conduct violated the terms of the decree, and had knowledge (at least constructive knowledge) of such violations; and (4) . . . that [the] movant suffered harm as a result." *Commonwealth Const. Co. v. Redding*, No. 1:14-CV-3568-GLR, 2015 WL 877406, at *2 (D. Md. Feb. 27, 2015) (holding subpoenaed party in contempt for failure to appear at deposition and produce documents in response to subpoena) (quoting *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 301 (4th Cir. 2000)). Such an order of civil contempt is appropriate here.

To start, One Touch cannot show any adequate excuse for its failure to comply with the Subpoenas as the Subpoenas were properly served on its authorized agent and it has not raised any objections to service. Typically, once the party issuing the subpoena has made a *prima facie* showing that a subpoena has been properly issued, courts require the subpoenaed party to make an affirmative showing that its failure to comply was justified. *See Anderson v. Prince George's Cty., MD*, No. CIV.A. TDC-13-1509, 2014 WL 2926537, at *2 (D. Md. June 26, 2014) (holding that the subpoena was properly issued and entering an order to show cause requiring the subpoenaed party to provide an "adequate excuse" for its failure to comply with the subpoena). And while Rule 45 "does not define 'adequate excuse[,]'" *Higginbotham v. KCS Int'l, Inc.*, 202 F.R.D. 444, 455 (D. Md. 2001) (citation omitted), it is clear that *some* affirmative justification is required. *See SonoMedica, Inc.*, 2009 WL 2371507 (holding subpoenaed party in contempt where it offered no excuse for its failure to comply with subpoena). Moreover, One Touch has not provided *any* excuse – much less an adequate one – for its failure to comply. *Cf. Higginbotham*, 202 F.R.D. at 455 (rejecting as inadequate the subpoenaed party's proffered excuse for failing to appear at a deposition, holding that even a work conflict was insufficient to "justify disobeying a subpoena'"). As such, One Touch should be held in contempt

Additionally, holding One Touch in civil contempt is appropriate because the circumstances presented meet each of the Fourth Circuit's four-part test requirements. First, the Subpoenas were each valid decrees and One Touch had actual knowledge of them, as evidenced by the fact that the Subpoenas were served on One Touch's authorized agent and Plaintiffs' Counsel discussed them with One Touch's Vice President, Mr. Mahmood, on multiple occasions. Ex. 6, Pollock Decl. at ¶¶ 3-4 (describing Plaintiffs' Counsel's communications with Mr. Mahmood and his agreement to produce One Touch's responsive documents); Exs. 2-5 (setting forth relevant deadlines); *See Commonwealth Const. Co.*, 2015 WL 877406, at *2 (holding that subpoena was "valid decree" and that the affidavit of service established "actual or constructive knowledge of" the valid decrees).

Second, there can be no doubt that the Subpoenas were "decrees" in favor of Plaintiffs because they were issued by Plaintiffs and seek documents specifically relevant to the advancement of Plaintiffs' claims in the Underlying Action. *See Commonwealth Const. Co*, 2015 WL 877406, at *2 (holding that a subpoena was a "decree" for purposes of civil contempt and it was in the issuing party's favor because it sought documents at the issuing party's request).

Third, One Touch was aware that it was in violation of the Subpoenas because the Subpoenas were served on One Touch and set clear deadlines for the production of documents, and One Touch's deposition. Exs. 2-5. Further, Plaintiffs' Counsel explicitly (and repeatedly) reminded One Touch of its obligations. Composite Ex. 7 (informing and reminding Mr. Mahmood that One Touch was required to produce documents by Sept. 15, 2016 and later, present a witness for deposition on Feb. 15, 2017). In fact, Plaintiffs' Counsel expressly stated that if One Touch did not present a witness for deposition, Plaintiffs would file the instant motion. Composite Ex. 7 (Feb. 9, 2017 Email to Mr. Mahmood). Accordingly, One Touch was aware that it was in violation of the Subpoenas. *See Commonwealth Const. Co.*, 2015 WL 877406, at *2 (holding subpoenaed party had "at least constructive knowledge that he was in violation of the Subpoena" because the plaintiff provided an affidavit of service for the subpoena and the subpoenaed party had been informed that failure to produce documents "may be treated as contempt").

And finally, Plaintiffs suffered harm as a result of One Touch's failure to comply with the Subpoenas as the information in its possession is crucial to demonstrate both Defendant's liability in the Underlying Action as well as that Plaintiffs' claims can be properly certified. Specifically, in regards to class certification, the information being withheld by One Touch is necessary to determine the number of call recipients (numerosity), to demonstrate that there is an administratively feasible means of identifying call recipients (ascertainability), and that the manner in which the calls were placed were common to the putative classes (commonality & predominance). *See Krakauer*, 311 F.R.D. at 393 (third-party call lists were relevant to commonality and ascertainability in TCPA class action). Additionally, One Touch's relationship with NRG and any documents related to NRG's control of One Touch will be necessary to show that NRG can be held vicariously liable for the calls. *Id.* at 395 (principal's control over third-party call center was relevant to issue of vicarious liability).

Moreover, Plaintiffs have suffered harm because they have spent significant time and money in an effort to obtain information within One Touch's possession. Ex. 6, Pollock Decl. at ¶ 9. *See SonoMedica, Inc.*, 2009 WL 2371507 (holding that the plaintiff had "suffered harm as a result of the [subpoenaed parties'] behavior by being required to . . . expend[] time, resources, and money in an effort to uncover the truth").

Therefore, the Court should hold One Touch in contempt and impose an appropriate sanction sufficient to compel One Touch to comply with the Subpoenas and compensate Plaintiffs for the time and money expended to compel such compliance. *See SonoMedica, Inc.*, 2009 WL 2371507, at *9 ("A court may enforce and punish willful violations of" court orders and subpoenas by holding the subpoenaed party in contempt and imposing sanctions including attorneys' fees).

CONCLUSION

For the foregoing reasons, Plaintiffs in the Underlying Action respectfully request that this Court enter an Order (i) requiring One Touch to show cause as to why it should not be held in contempt for failing to comply with the Subpoenas; (ii) imposing appropriate sanctions should it fail to do so; and (iii) granting any additional relief the Court deems reasonable and just.

Respectfully submitted,
MICHAEL DOBKIN and ERICA GENNARINI,

Dated: March 16, 2017

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CERTIFICATE OF SERVICE

I, Warner Young III, an attorney, hereby certify that on March 16, 2017, I caused to be served the above and foregoing ***Memorandum of Law in Support of Motion for an Order to Show Cause***, by causing a true and accurate copy of such paper to be filed and transmitted to the individuals listed below via electronic mail and U.S. Mail, on this 16th day of March 2017

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